Claims Report

United States Army Claims Service

Tort Claims Note

Finality of Military Claims Act Decisions

A decision to deny or make a final offer under the Military Claims Act (MCA)[1] is subject to an administrative appeal to the next higher claims authority.[2] If the appeal is denied, the action is final and conclusive.[3] Federal courts have uniformly upheld this finality provision.[4] For claims that are only considered under the MCA, however, the finality of a decision depends on whether jurisdiction over the claim exists under another federal statute. For this reason, claims that are denied under the non-combat activity provision of the MCA[5] should always be denied under the Federal Tort Claims Act (FTCA), [6] even though no negligent or wrongful act or omission is apparent. For example, claims offices should deny non-payable claims for blast damage under both the MCA and the FTCA.

The matter does not end there. In *Miller v. Auto Craft Shop*,[7] an off-duty soldier had the engine on his car overhauled in mid-January 1995 at the Fort Rucker, Alabama, auto-craft shop–a nonappropriated fund activity. The shop provided him with a written warranty. In April 1995, his mother in Tennessee reported that the car stopped running. Miller had the car towed back to Alabama, where the auto-craft shop could not determine the problem. Miller then had the car repaired at an outside repair shop, which diagnosed the problem as stemming from the January repair. Miller made a claim for the outside repairs, the cost of the original auto-craft repairs, the towing costs, and the diagnostic costs. The U.S. Army Claims Service (USARCS) offered to pay for the outside repairs, but not for the towing or diagnostic costs. The USARCS informed him that reimbursement for the auto-craft repair was a contract claim under the warranty. The USARCS also informed the claimant that his claim for the costs of the second repair, towing and diagnostic tests was *Feres* barred; therefore, the MCA was his sole remedy for these repairs.

Miller then brought suit in federal court. The court agreed that the claim for the second repair, towing and diagnostic costs were *Feres* barred.[8] Further, it held that the warranty claim was not *Feres* barred and constituted a separate contractual claim.[9] The court cited four federal cases to support its holding that the claimant was not entitled to a remedy under the MCA.

The first case that the court cited was *United States v. Huff*.[10] In *Huff*, the plaintiffs were permitted a remedy under the Tucker Act[11] for loss and damage to livestock on leased property that

1. 10 U.S.C.A. § 2733 (West 1999).

2. U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 3-6 (31 Dec. 1997) [hereinafter AR 27-20].

3. 10 U.S.C.A. § 2735. The finality provision also applies to claims under 10 U.S.C. § 2734 (The Foreign Claims Act), SOFA claims, and 10 U.S.C. § 2737 (The NonScope Claims Act).

4. *See, e.g.*, Towry v. United States, 620 F.2d 568 (5th Cir. 1980); Armstrong & Armstrong Inc. v. United States, 356 F. Supp. 514 (E.D. Wash. 1973); Barlow v. Collins, 397 U.S. 159 (1970); Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958); Bryson v. United States, 463 F. Supp. 908 (E.D. Pa. 1978); Gerritson v. Vance, 488 F. Supp. 267 (D. Mass. 1970); Morrison v. United States, 316 F. Supp. 78 (M.D. Ga. 1970); Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978); Broadnax v. U.S. Army, 710 F.2d 865 (D.C. Cir. 1983); LaBash v. Department of the Army, 668 F.2d 1153 (10th Cir. 1982). *See also* Hata v. United States, 23 F.3d 230 (9th Cir. 1994) (holding that the denial of claim under the Military Claims Act as incident to service withstands Constitutional challenge—suit for wrongful death of active duty service member in Navy hospital in Japan); Rodriguez v. United States, 968 F.2d 1420 (1st Cir. 1992) (holding that an MCA incident-to-service determination not subject to judicial review); Hass v. U.S. Air Force, 848 F. Supp. 926 (D. Kan. 1994) (holding that the denial of a claim for attorney fees by airman under Military Claims Act is not subject to review due to finality provisions of 10 U.S.C.A. § 2735); Schneider v. United States, 27 F.3d 1327 (8th Cir. 1994) (holding that the denial of an MCA claim arising in Okinawa does not create Constitutional claim); Collins v. United States, 67 F.3d 284 (Fed. Cir. 1995) (holding that the denial of a claim for attorney fees under MCA is final and conclusive); Duncan v. United States, No. CA 96-1648-A (4th Cir. 24 June 1998) (holding that six objections to the finality of an MCA decision did not raise Constitutional issues).

5. 10 U.S.C.A. § 2733(a)(3).

6. 28 U.S.C.A. §§ 1346, 2401(b), 2671-2680 (West 1999).

7. 13 F. Supp. 2d 1220 (M.D. Ala. 1997).

8. *Id.* at 1223.

9. *Id.*

10. 165 F.2d 720, 725-26 (5th Cir. 1948).

11. 28 U.S.C.A. § 1491.

was used for artillery firing and maneuvers. The court permitted this remedy even though the claim was cognizable under the MCA.

The second case cited was *Hass v. United States*.[12] In *Hass*, an active duty Air Force member allegedly used her military security clearance to obtain information in her off-duty job with a private investigations firm. She was ordered to discontinue her off-duty employment. She then filed a claim seeking, among other things, the $150 fee that she paid to obtain her private investigators license. The Air Force denied her MCA claim. The court held that her claim was cognizable under the FTCA. The court, however, dismissed the FTCA claim for failure to pursue her administrative remedy.[13]

The third case that the court cited was *Bryson v. United States*.[14] *Bryson* involved an intoxicated soldier who was unable to remove himself from the men's room in a barracks at Bad Hersfeld, Germany. The drunken soldier killed a fellow soldier who was attempting to help him, by repeatedly bashing his head on the floor. The decedent's family brought a claim against the government under both the MCA and the FTCA. The court, however, denied the MCA claim because the drunken soldier's actions were not incident to service. The court permitted an FTCA suit based on negligent hiring and retention, a so-called "headquarters tort" as it was based on actions which occurred in the United States, not in a foreign country.

The final case cited by the *Miller* court was *Arkwright Mutual Ins. Co. v. Bargain City USA Inc*.[15] *Arkwright* involved a U.S. Navy jet aircraft that crashed into a Bargain City store resulting in a loss of rental income in excess of $100,000. The Navy settled the claim under the MCA for $285,106.30; this amount included $156,000 for loss of rental income. The Navy then sent the claim to Congress for supplemental appropriation, as required at that time. In March 1962, on the strength of the settlement, Arkwright loaned Bargain City $100,000. On 19 October 1962, Bargain City filed for bankruptcy and, upon payment by Congress, the entire sum became part of the bankruptcy estate. Arkwright's claim for a $100,000 equitable lien, however, was defeated because Bargain City had a property damage claim under the FTCA, which was not negated by the MCA settlement. Such property damage was held to be part of its estate.

As a practical matter, claims arising in foreign countries will be considered under either the MCA or the Foreign Claims Act (FCA),[16] depending on whether the claimant is a foreign inhabitant.[17] The FTCA comes into play only if the claimant alleges a headquarters tort, as in *Bryson*. In this event, any final action should include final action under the FTCA. Claims arising in the United States normally fall under the FTCA except for soldiers' claims incident to service for property loss. Such claims fall under the Personnel Claims Act (PCA)[18] or the MCA(with the PCA taking priority. The problem arises when a non-combat MCA claim is filed. In such a case, final action should be taken under both the MCA and FTCA.

The *Miller* case presents special problems due to the lack of authority to pay non-appropriated fund (NAF) contractual claims out of NAF claims funds. The automotive craft/skills program is designed to provide a self-help alternative to commercial repair facilities. *Army Regulation (AR) 215-1*,[19] sets out in detail how the program is designed to provide both training and a facility where eligible patrons can repair their own vehicles. Recent claims arising out of these facilities indicate that the operation has become akin to a commercial operation as in the *Miller* case. A warranty guaranteeing proper repair does not provide a basis for paying a tort claim under *AR 27-20*, chapter 12. Equally true, there is no authority to use NAF claims funds to pay a warranty claim. Corrective action is a matter to be resolved by the Army Community and Family Support Center. Local judge advocates should caution craft shops and other NAFs against repair warranties unless funds are available to pay such warranties.

In conclusion, each claim must be considered under all statutes that are implemented by *AR 27-20*.[20] A denial notice should reflect such consideration. If the claim does not fall under a statute governed by *AR 27-20*, the claims office should direct the claimant to the correct remedy in the denial notice.[21] Mr. Rouse.

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12. 848 F. Supp. 926, 933 n.6 (D. Kan. 1994).

13. This dismissal is specious as she had already filed an administrative claim.

14. 463 F. Supp. 908, 910 (E.D. Pa. 1978).

15. 251 F. Supp. 221, 227-28 (E.D. Pa. 1966). The court does not explain why an MCA property damage claim is not part of Bargain City's estate.

16. 10 U.S.C.A. § 2734 (West 1999).

17. Unless the claim falls under a status of forces agreement. *See* AR 27-20, *supra* note 2, para. 7-1c.

18. 31 U.S.C.A. § 3721 (West 1999).

19. U.S. DEP'T OF ARMY, REG. 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES (29 Sept. 1996).

20. AR 27-20, *supra* note 2, para. 2-18.

Personnel Claims Notes

Compensation for Repairable Porcelain Figurines

The USARCS continues to see claims involving payment of full replacement value for expensive figurines that may have been repairable (for example, a claimant brings in a $700 Hummel figurine of a horse and rider with one leg broken off of the horse. The break is clean with no pieces missing). Porcelain figurines that are damaged in this way do not always need to be replaced. If the damage is a clean break, and the broken piece is available, repair is usually possible. The claimant should first attempt to have the item repaired. If the damage can be repaired, the claimant is due only the repair cost plus a reasonable loss of value, as determined by a qualified appraiser. The claims examiner should, of course, inspect the damaged figurine before sending the claimant to get an estimate. Mr. Lickliter.

Posting Payments to Claims Involving Insurance Payments

The USARCS has received several claims with very detailed and time consuming entries to explain insurance payments. A very simple procedure for posting these payments has been developed. If it is followed, this procedure will save a lot of time.

Insurance settlements involving only one item pose no problem, and can be copied directly from the insurance notice. Those containing more than one item, however, can be confusing.

First, claims adjudicators should determine the amount that they actually paid for each line item. If there has been a settlement that did not involve a deductible amount, adjudicators can use the amounts listed by the insurance company. If there was a deductible involved, however, some extra work will be needed, because the amount listed by each item is the amount payable before deduction of the deductible amount.

To determine the amount paid for each individual line item after deduction for the deductible,[22] claims adjudicators must divide the amount actually paid by the amount adjudicated before subtracting the deductible (divide the little number by the big number),[23] and get a six digit decimal figure. Then multiply each line item payment by that decimal figure to get the actual amount paid for that individual item.

Second, claims personnel must adjudicate each item claimed on DD Form 1844, List of Personal Property and Claims Analysis Chart, to determine what to actually pay for that item. Then you compare the two amounts and post them both to the line item on DD Form 1844. The amounts paid by insurance will always be in parentheses (and your amounts without parentheses). Adjudicators must then post the higher of these two amounts in the amount allowed column (#25) and the lesser amount in the adjudicator's remarks column (#26).

Third, adjudicators should add up all the figures in the amount allowed column, regardless of whether they are insurance payments or not, and enter the total in block #30. Next, go through again and add up all of the figures in parentheses (include both columns 25 and 26), and enter this figure in block #30. Subtract these amounts and the balance remaining is the amount payable to the claimant.

This procedure not only simplifies the work of the claims adjudicator, but assists the recovery people in identifying amounts to be returned to the insurance company after settlement with the carrier. Mr. Lickliter.

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21. U.S. DEP'T OF ARMY, PAM 27-162, CLAIMS PROCEDURES, para. 2-28 (1 Apr. 1998) [hereinafter DA PAM 27-162].

22. AR 27-20, *supra* note 2, para. 11-11f(2).

23. DA PAM 27-162, *supra* note 21, para. 11-21a(2).